WUI KUANG LIANG

v.

THE GOVERNMENT OF MALAYSIA & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING
CLEMENT SKINNER J
[CIVIL APPEAL NO: 12-03-2004-III(I)]
8 FEBRUARY 2006

CIVIL PROCEDURE: *Pleadings - Striking out - Application for - Subordinate Courts Rules 1980, O. 14 r. 21 - Whether application should be refused if made after case set down for trial - Whether sessions judge erred when it disallowed appellant's application*

CIVIL PROCEDURE: *Pleadings - Striking out - Application for - Application to strike out respondents' defence - Subordinate Courts Rules 1980, O. 14 r. 21 - Whether respondents' defence frivolous and vexatious - Whether an abuse of court process - Whether there was reason to interfere with decision of sessions judge in dismissing appellant's application*

CIVIL PROCEDURE: *Pleadings - Striking out - Writ of summons and statement of claim - Application to strike out - Whether appellant set out material facts giving rise to cause of action - Whether statement of claim abundantly disclosed reasonable cause of action*

CIVIL PROCEDURE: *Pleadings - Subordinate Courts Rules 1980, O. 14 r. 21 - Provisions of - Whether sessions judge erred when it went beyond pleadings and looked at evidence adduced - Cause of action - Malicious prosecution - Whether appellant granted a discharge - Whether appellant's cause of action premature*

This was the appellant's appeal against the whole of the decision of the Sessions Court Judge dismissing the appellant's application to strike out the respondents' defence but allowed the respondents' application to strike out the appellant's writ of summons and statement of claims. The facts were that the appellant, a businessman, sold some food products to a trader in Indonesia. According to the appellant, the Indonesian trader arranged for his own lorries and drivers to take delivery of the goods sold to him. On 28 March 2001, one of the lorries was on its way to Indonesia *via* Tebedu, Serian when it was inspected by officers of the second respondent *ie*, the Jabatan Pengangkutan Jalan. It was found to be carrying a load in excess of the

maximum weight allowed in the permit issued by the Commercial Licensing Board. Thereafter, the appellant was issued with a traffic summons ordering him to appear at the Magistrate's Court to answer a charge under s. 19(4) (Amended) of the Commercial Vehicles Licensing Board Act 1987. On being served the summons, the appellant wrote to the second respondent explaining that he was only the seller of the goods on the lorry and had nothing to do with the use of the said vehicle on which the goods were being carried. On the case coming on for trial, the second respondent applied for the charge to be withdrawn against the appellant whereupon the Magistrate ordered that the appellant be discharged, such discharge not amounting to an acquittal. The appellant then wrote to the second respondent requesting for compensation to be paid to the appellant for the loss and suffering caused him for his alleged malicious prosecution.

On receiving no response from the second respondent, the appellant commenced this suit alleging that the second respondent had maliciously and without reasonable and probable cause prosecuted him and claimed special damages as well as general damages. The respondents filed a defence in which they averred that the charge against the appellant was withdrawn on the instructions of the Public Prosecutor and maintained that they had taken action against the appellant in accordance with the law. The appellant then applied to strike out the respondents' defence under O. 14 r. 21 Subordinate Courts Rules ('SCR') on the ground that it was frivolous and vexatious. The respondents also filed an application under the SCR to strike out the appellant's writ of summons and statement of claim on the sole ground that it disclosed no reasonable cause of action. The Sessions Court Judge dismissed the appellant's application and in her ruling, drew attention to the fact that the appellant's application had been filed only after he had applied by notice and obtained directions for the trial of this case. Hence, this appeal.

Held:

(1) The Sessions Judge was not wrong in her decision to disallow the appellant's application. Order 14 r. 21(1) SCR is in *pari material* with O. 18 r. 19(1) Rules of the High Court 1980. Although both rules state that an application may be made

under the rule 'at any stage of the proceedings', case law showed that an application under this rule should be made promptly, usually before the close of the pleadings and would be refused where it was made after the case was set down for trial. (para 17)

(2) It could not be said at this stage of the proceedings that the respondents' defence of having taken action against the appellant in accordance with the law under s. 19(4) of the Commercial Vehicles Licensing Board Act 1987 was a frivolous and vexatious defence which was raised to prejudice or delay the fair trial of this action or in abuse of the process of the court. There was no reason to interfere with the decision of the Sessions Judge in dismissing the appellant's application to strike out the respondents' defence. (para 18)

(3) In the appellant's statement of claim, he had set out sufficiently all the material facts giving rise to his cause of action. He had pleaded (1) the fact of the charge being brought against him and of the termination of his proceedings (2) he had informed the respondents that the said vehicle was not his and neither did he know the driver of the same and that his lawyers had explained the whole incident to the second respondent (3) that the proceedings in the Magistrate's court had been instituted maliciously and without reasonable and probable cause and (4) that as a result of the second respondent's action he had suffered damages and set out what those damages consisted of. The appellant's statement of claim abundantly disclosed a reasonable cause of action. (para 20)

(4) Contrary to the express provisions of O. 14 r. 21(2) SCR as well as the principle that only pleadings are to be looked at in an application of this nature, the Sessions Judge went beyond the pleadings and looked at the evidence adduced by the respondents in the form of the Customs Declaration to conclude that the appellant was a consignor. In so doing, she had fallen into error. The court below was not in a position, without having heard any evidence on the matter, to come to the further finding that it was the appellant, as 'consignor' who 'caused' or 'permitted' the use of the said vehicle and therefore was caught by s. 19(4) of the Commercial Vehicles Licensing Board Act 1987 and so had no cause of action

against the respondents. There was no basis for the Sessions Judge to strike out the appellant's claim at this stage of the case. (paras 22 & 23)

(5) The appellant herein was not questioning the power and discretion of the Public Prosecutor. The appellant's cause of action was for malicious prosecution, the success or failure of which action would depend whether or not it could be shown that the second respondent instituted or carried on the proceedings maliciously or whether there was an absence of reasonable and probable cause for the proceedings, which were questions that gave rise to issues of mixed fact and law which were dependent for their resolution on all the circumstances and evidence that were disclosed at trial. Such questions were not suitable to be decided on disputed facts in the affidavits of the parties, and certainly could not be decided by merely looking at the pleadings only on an application under the first limb of O. 14 r. 21(1)(a) SCR. (para 24)

(6) The appellant had been discharged from the offence with which he stood charged. There was no longer any charge against him or hanging over his head. It was within the right of the respondents to prosecute him for the same offence but they must re-charge him if they wish to do so. Until then, he is a free person because the proceedings in the Magistrate's Court against him have terminated on his being granted a discharge. Accordingly there was no question of the appellant's cause of action not having accrued yet or that it was premature. (para 25)

(7) For all the reasons given, this court allowed the appellant's appeal against that part of the Sessions Judge's decision that struck out his claim. The case was ordered to be remitted back to the Sessions Court to be tried. Since the appellant had succeeded in his appeal against the decision of the Sessions Judge in respect of the respondents' application but failed in his appeal against the decision of the Sessions Judge in respect of his own application, each party was to bear its own costs and in the court below. (para 26)

[Order accordingly.]

Case(s) referred to:

Jamir Hassan v. Kang Min [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773 HC ***(refd)***

Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211 FC ***(refd)***

PP v. Zainuddin & Anor [1986] 2 MLJ 100 ***(refd)***

Legislation referred to:

Commercial Vehicles Licensing Board Act 1987, s. 19(3), (4)
Criminal Procedure Code, s. 376
Federal Constitution, art. 145(3)
Subordinate Courts Rules 1980, O. 14 r. 21(1)(a)

For the appellant/plaintiff - John Shek; M/s John Shek, Sigar, Wei Yee & Co
For the respondents/defendants - Nik Mohd Noor DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Clement Skinner J:

[1] This is the hearing of an appeal brought by Wui Kuang Liang ('the appellant') who was the plaintiff in the court below. The appeal is against the whole of the decision of the learned Sessions Court Judge who, on 16 February 2004, dismissed the appellant's application to strike out the respondents' defence, but allowed the respondents' application to strike out the appellant's writ of summons and statement of claims on the ground that it disclosed no reasonable cause of action.

[2] The facts leading up to this appeal are these. The appellant is a businessman trading under the name and style of Chop Wi Kee and runs a shop at No. 77 Ewe Hai Street, Kuching. Some time in March 2001 the appellant sold some food products to a trader from Indonesia. According to the appellant this Indonesian trader, one Tony Ah Hui arranged for his own lorries and drivers to take delivery of the goods sold to him. The delivery note (MB2) issued by the appellant shows that the lorries that took delivery of the goods bore registration No. KB9484AC and KB9056AC respectively. On 28 March 2001 one of the lorries, namely, KB9484AC was on its way to Indonesia *via* Tebedu, Serian when it was inspected by officers of the 2nd respondent ie, the Jabatan Pengangkutan Jalan, and weighed. It was found to be carrying a load in excess of the maximum weight allowed in the permit issued

by the Commercial Licensing Board to vehicle KB9484AC (hereafter 'the said vehicle'). On weighing the said vehicle the 2nd respondent issued a 'Sijil/Tiket Timbang Berat' numbered 569S. This ticket shows that the name and address of the owner of the said vehicle is:

> C.V. Ikaper
> Jalan Pengeran Pati Balai Kerangan 15
> Kecamatan Sekayam Sanggau

And the name and address of the driver is:

> Jari bin Pawiro
> GG Sukamaju Dalam Rt. 02/RW.V
> Pontianak

It is not in dispute that both the above addresses are in Indonesia.

[3] On 4 April 2001 the appellant was issued with a traffic summons ordering him to appear at the Magistrate's Court Serian on 11 July 2001 to answer a charge under s. 19(4) (Amended) of the Commercial Vehicles Licensing Board Act 1987. That section reads:

> In the case of a vehicle used for the transportation of goods and in respect of which a licence under this Act has been issued, the holder of the licence or any other person who causes or permits the vehicle to be used by any person shall, if the person who uses the vehicle fails to comply with any of the conditions attached to the licence under this section, shall be guilty of an offence and shall on conviction be liable to a fine of not less than one thousand ringgit but not more than ten thousand ringgit or to imprisonment for a term not exceeding one year or to both.

[4] On being served the summons the appellant wrote to the 2nd respondent on 23 April 2001, through his lawyers, explaining that he was only the seller of the goods on the lorry and had nothing to do with the use of the said vehicle on which the goods were being carried.

[5] When the appellant received no reply from the 2nd respondent, his lawyers wrote to the 2nd respondent again on 26 May 2001 on the matter. Again there was no reply from the 2nd respondent.

[6] On 11 July 2001 the appellant appeared at the Magistrate's Court Serian when the case was adjourned to 8 August 2001.

[7] On 8 August 2001 the appellant appeared at the Magistrate's Court, Serian when his plea was taken. He pleaded not guilty to the charge and was released on bail of RM1,000 without any surety. The case was fixed for hearing on 6 November 2001.

[8] On the case coming on for trial on 6 November 2001 the 2nd respondent applied for the charge to be withdrawn against the appellant whereupon the Magistrate ordered that the appellant be discharged, such discharge not amounting to an acquittal. Apparently no reasons were given for the withdrawal and it is not disputed that till today the appellant has not been re-charged for the alleged offence.

[9] After obtaining the discharge, the appellant's lawyers wrote to the 2nd respondent requesting for compensation to be paid to the appellant for the loss and suffering caused him for his alleged malicious prosecution.

[10] On receiving no response from the 2nd respondent, the appellant commenced this suit at the Sessions Court Kuching on 21 January 2002 alleging that the 2nd respondent as the servant or agent of the 1st respondent had maliciously and without reasonable and probable cause prosecuted him. The appellant claimed against the respondents special damages (particulars of which were set out in his statement of claim) as well as general damages.

[11] The respondents filed a defence dated 6 May 2002 in which they averred that the charge against the appellant was withdrawn on the instructions of the Public Prosecutor and that they need not give any reasons for so doing. The respondents also maintained that they had taken action against the appellant in accordance with the law, in particular, s. 19(4) of the Commercial Vehicles Licensing Board Act 1987 and prayed for the appellant's claim to be dismissed with costs.

[12] The appellant then applied to strike out the respondents' defence under O. 14 r. 21 Subordinate Courts Rules ('the SCR') on the ground that it was (i) scandalous, frivolous and vexatious; (ii) it prejudices, embarrasses and delays the fair trial of this action; and (iii) it is an abuse of the process of the court.

[13] At a later date the respondents also filed an application under O. 14 r. 21 SCR to strike out the appellant's writ of summons and statement of claim under the first limb of the rule ie, on the sole ground that it discloses no reasonable cause of action.

[14] The applications came up for hearing together. The learned Sessions Judge dismissed the appellant's application. In her ruling the learned Sessions Judge drew attention to the fact that the appellant's application had been filed only after he had applied by notice and obtained directions for the trial of this case, including an order fixing this case for trial on 26 July 2004. Accordingly the learned Sessions Judge held that an application to strike out a defence could not be made after an action had been set down for trial and on this ground alone dismissed the appellant's application.

[15] With regard to the respondents' application the learned Sessions Judge allowed it on two grounds. In doing so she first considered the 'legality of the traffic summons'. After referring to s. 19(3) *(sic)* (which is in fact the wrong section) of the Act the learned Sessions Judge was of the view that the appellant, being the 'consignor' of the goods, could be considered to be a person caught by s. 19(3), in that, he could be regarded as a person falling within the definition of the words '... any person using, causing or permitting the use of a vehicle ...' found in s. 19(3) *(sic)* of the Act. Therefore, according to the learned Sessions Judge 'it cannot be said that the discretion of the Public Prosecutor to charge him in this case was wrongly or maliciously exercised'. Although I will return to this point shortly, it should be noted here that the learned Sessions Judge was able to refer to the appellant as the 'consignor' of the goods only because the 2nd respondent (through the affidavit of its officer one Mora Bait, affirmed on 26 August 2002) had produced as an exhibit in the proceedings a Royal Malaysian Customs and Excise Department Form in respect of 'Goods to be Exported' in which the appellant was named as 'consignor' and Tony Ah Hui as 'consignee'. A further comment that I would make at this stage is that even though the learned Sessions Judge referred to the wrong sub-section of the law in her judgment, I do not think the error was fatal because s. 19(4) of the same Act also uses the words 'causes' or 'permits' and so these words are common elements to charge under either section.

[16] The second ground relied on by the learned Sessions Judge was that the appellant had rightly been granted only a discharge not amounting to an acquittal by the Magistrate. The learned Sessions Judge noted that such an order was in accordance with the Supreme Court decision in *PP v. Zainuddin & Anor* [1986] 2 MLJ 100. The learned Sessions Judge went on to say that since art. 145(3) of the Federal Constitution read with s. 376 of the Criminal Procedure Code vested in the Public Prosecutor the sole discretion to institute, conduct or discontinue any proceedings for any offence, she found that 'the discretion to charge and to withdraw the charge against the plaintiff has not been proven to have been withdrawn maliciously'. Accordingly, she allowed the respondents' application and struck out the plaintiff's summons and statement of claim with costs. Hence this appeal.

[17] I will now consider the merits of the appellant's appeal. First, his appeal against the decision to disallow his application. In my judgment the learned Sessions Judge was not wrong in this part of her decision. Order 14 r. 21(1) SCR is in *pari materia* with O. 18 r. 19(1) Rules of the High Court. Although both rules state that an application may be made under the rule 'at any stage of the proceedings', case law shows that an application under this rule should be made promptly, usually before the close of pleadings and will be refused where it is made after the case is set down for trial, as was the case here. For this see the decision of Haider J, (as he then was) in *Jamir Hassan v. Kang Min* [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773, a decision with which I respectfully agree.

[18] Quite apart from the above reason I do not think the learned Sessions Judge was wrong to dismiss the appellant's application because given the fact that goods sold by the appellant were found on the over-laden lorry in question and given also that in resisting the appellant's application the respondents had produced a Customs Declaration Form showing that the appellant was the 'consignor' of the goods, I do not think it can be said at this stage of the proceedings that the respondents' defence of having taken action against the appellant in accordance with the law under s. 19(4) of the Commercial Vehicles Licensing Board Act 1987 is a frivolous and vexatious defence which was raised to prejudice or delay the fair trial of this action or in abuse of the process of the court. Accordingly I see no reason to interfere with the decision of the learned Sessions Judge in dismissing the appellant's application to strike out the respondents' defence.

[19] With regard to the learned Sessions Judge's decision to allow the respondents' application and thereafter strike out the appellant's claim, it is my finding that she had taken the wrong approach in deciding the respondent's application as a consequence of which she had misdirected herself in law and in fact in doing so. I say so for the following reasons.

[20] Even though the learned Sessions Judge had heard the two applications together, she should have reminded herself that different considerations apply to each application. Whereas it was permissible to look at the affidavits of the parties and the documentary evidence they produced when deciding the appellant's application, such a course was not open to her when considering the respondents' application. The respondents had applied to strike out the appellant's claim solely under the first limb of O. 14 r. 21(1)(a) SCR ie, that the appellant's statement of claim disclosed no reasonable cause of action. Sub-rule (2) of O. 14 states that no evidence shall be admissible on an application under para. (1)(a). Accordingly, in deciding the respondents' application only the pleadings are to be looked at. In his statement of claim the appellant had, in my view, set out sufficiently all the material facts giving rise to his cause of action. He had pleaded the fact of the charge being brought against him at the Magistrate's Court Serian and of the termination of those proceedings in his favour. He had also pleaded that he had informed the respondents that the said vehicle was not his and neither did he know the driver of the same and that his lawyers had explained the whole incident to the 2nd respondent. He also pleaded that the 2nd respondent had instituted the proceedings in the Magistrate's Court maliciously and without reasonable and probable cause. The appellant also pleaded that as a result of the 2nd respondent's action he had suffered damages and set out what those damages consisted of. In *Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor* [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211, the Federal Court held that 'under O. 18 r. 19 RHC pleadings will only be struck out in plain and obvious cases. So long as the statement of claim disclosed some ground of action, the mere fact that the plaintiff is unlikely to succeed at the trial is no ground for striking out.' Applying what was said in the above case, I think the appellant's statement of claim abundantly disclosed a reasonable cause of action.

In my view the learned Sessions Judge seems to have overlooked the fact that when considering an application under O. 14 r. 21(1)(a) SCR, no evidence is admissible. As I mentioned earlier, the reason the learned Sessions Judge held that 'it cannot be said that the discretion of the Public Prosecutor to charge him (the appellant) in this case was wrongly or maliciously exercised', was because she found that the appellant was a 'consignor' of the goods. According to the Sessions Judge as a consignor the appellant was caught by s. 19(3) (it should be s. 19(4)) as he can be regarded as a person 'using', 'causing' or 'permitting' the use of the said vehicle in breach of its licence conditions. Two points may be taken on this finding of the learned Sessions Judge.

[22] The first question that must be asked about this finding is this: On what basis did the learned Sessions Judge conclude that the appellant was a 'consignor' of the goods when it was never pleaded either in the statement of claim or in the respondents' defence that he was a consignor of goods? It is quite evident to me that contrary to the express provisions of O. 14 r. 21(2) SCR as well as the principle that only the pleadings are to be looked at in an application of this nature, the learned Sessions Judge went beyond the pleadings and looked at the evidence adduced by the respondents in the form of the Customs Declaration to conclude that the appellant was a consignor. In so doing she had fallen into error.

[23] Secondly, even if the appellant was named as a 'consignor' in the customs declaration form, it does not follow as a matter of course that he had no cause of action simply because he can be regarded as a person 'causing' or 'permitting' the use of the said vehicle. In my view it may well be that even though the appellant was named as a 'consignor' yet he had nothing at all to do with causing or permitting the use of the said vehicle. Put in another way, even though s. 19(4) might apply to a 'consignor' of goods, for the appellant to be caught by the section the court must still go one step further to arrive at a finding that the appellant had, as 'consignor', 'caused' or 'permitted' the said vehicle to be used in breach of its licence conditions. At this stage of the proceedings it must not be overlooked that it is not even known who signed and submitted the customs declaration form naming the appellant as 'consignor' as this was never disclosed in the form or by the respondents who produced it.

[24] Given the fact that the appellant had denied any involvement with the said vehicle or that he knew the driver, and given also the assertion of the appellant that it was the Indonesian trader that had arranged for his own lorries and drivers to take delivery of the goods and given further that the weigh bridge ticket issued by the 2nd respondent shows that the owner of the said lorry and the driver are from Indonesia, the court below was not in a position, without having heard any evidence on the matter, to come to the further finding that it was the appellant, as consignor, who 'caused' or 'permitted' the use of the said vehicle and therefore was caught by the section and so had no cause of action against the respondents. In my judgment there was no basis for the learned Sessions Judge to strike out the appellant's claim at this stage of the case.

[24] With regard to the learned Sessions Judge's finding that it was within the Public Prosecutor's sole discretion and power to charge or to withdraw a charge against a person, I do not think that the appellant was here questioning or challenging that discretion and power. Here the appellant's cause of action is for malicious prosecution, the success or failure of which action will depend on whether or not it can be shown that the 2nd respondent instituted or carried on the proceedings maliciously or whether there was an absence of reasonable and probable cause for the proceedings, which are questions that give rise to issues of mixed fact and law which are dependent for their resolution on all the circumstances and evidence that are disclosed at a trial. Such questions are not suitable to be decided on disputed facts in the affidavits of the parties, and certainly cannot be decided by merely looking at the pleadings only on an application under the first limb of O. 14 r. 21(1)(a) SCR.

[25] It was argued by learned counsel for the respondents before the learned Sessions Court Judge as it was before me on appeal, that the appellant's case should be struck out as it disclosed no reasonable cause of action for two reasons: (a) since the appellant was only granted a discharge not amounting to an acquittal, the proceedings against him had only been stayed and not finally disposed off in his favour. Hence, according to the respondents, the appellant's cause of action had yet to accrue; and (b) until the criminal case against the appellant is finally disposed off, resulting in either his conviction or an acquittal, the appellant's case is premature. I regret I do not agree with this argument.

[26] It is self contradictory. In one breath the respondents say the appellant's cause of action has not yet accrued but in another breath they maintain that there is a criminal charge instituted against the appellant but it is stayed and not finally disposed off yet. I cannot agree with the respondents' contention because the truth of the matter is that the appellant has been discharged from the offence with which he stood charged. There is no longer any charge against him or hanging over his head. It is within the right of the respondents to prosecute him for the same offence but they must re-charge him if they wish to do so. Until then he is a free person because the proceedings in the Magistrate's Court against him have terminated on his being granted a discharge. Accordingly there is no question of the appellant's cause of action not having accrued yet or that it is premature.

[27] In the result, for all the reasons I have given, I allow the appellant's appeal against that part of the learned Sessions Judge's decision that strikes out his claim. I order that the case be remitted back to the Sessions Court to be tried. Since the appellant has succeeded in his appeal against the decision of the learned Sessions Judge in respect of the respondents' application but failed in his appeal against the decision of the learned Sessions Judge in respect of his own application, I order that each party is to bear its own costs here and in the court below.